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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JOE G. GARCIA, *et al.*,
Petitioners,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS OF THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Where Congress has by statute established standards for determining whether reliance on previously-established law shall provide a defense to a class of claims, may a court disregard that statute and adjudicate that defense under the judge-made standards of *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971)?

2. Did the Court of Appeals manifestly and seriously misapply the standards of *Chevron Oil*?

3. Where this Court has overruled a prior precedent, may a lower court determine that the overruling decision is to be applied only prospectively and yet refuse to adjudicate the merits of the case on the basis of the old rule?

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 838 F.2d 1411, and is reproduced at pp. 1a-20a of the Appendix, *infra* ("A. "). The opinion of the District Court is not reported, and is reproduced at A. 22a-26a.

JURISDICTION

The judgment of the Court of Appeals was entered on March 9, 1988. A. 21a. The District Court had jurisdiction under 28 U.S.C. §§ 1331 and 1337. On May 25, 1988, Justice White extended the time for filing this petition to and until July 7, 1988. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

This case involves §§ 7(a)(1) and 16(b) of the Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended, 29 U.S.C. §§ 201 *et seq.* ("FLSA"), and § 10 of the

Portal-to-Portal Act of 1947, 61 Stat. 84, 29 U.S.C. §§ 251 *et seq.* ("Portal Act"). This case also involves 29 C.F.R. §§ 775.2-775.4. These provisions are reproduced at A. 27a-32a.

STATEMENT OF THE CASE

A. The *National League of Cities* Decision and DOL's Implementing Regulations

On June 24, 1976, this Court decided *National League of Cities* v. *Usery*, 426 U.S. 833 ("*National League*"). The Court there held, overruling *Maryland* v. *Wirtz*, 392 U.S. 183, that the Commerce Clause does not empower Congress to enforce the minimum-wage and overtime provisions of the FLSA "to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions." 426 U.S. at 852. Under this standard, some, but not all, governmental operations were constitutionally immune from the FLSA.[1]

The uncertainty thereby created greatly troubled the district court to which the *National League* case was returned, and that court, with the cooperation of the Department of Labor, developed a solution which is of considerable importance to the issues now before this Court. These events were described by the Solicitor General in a brief in this Court:

> On remand for entry of an order implementing this Court's *National League of Cities* decision, the three-judge district court concluded that this Court's decision was "limited to invalidating regulation, under the commerce clause, of the hours and wages of those state and local government employees engaged in activities integral to and traditionally provided by government." *National League of Cities* v. *Marshall*,

[1] The Court identified several operations which were immune under this test (*id.* at 851 and n.16) and one (carriage by rail in interstate commerce) which was not (*id.* at 854, n.18).

429 F. Supp. 703, 705 (D.D.C. 1977). Recognizing the existence of "a gray area, which will require elucidation in the factual settings presented by future cases" (*id.* at 706), and troubled by the possibility that double damages could be sought against state and local governments for FLSA violations (see 29 U.S.C. (Supp. V) 216(b) and (c)), the court concluded that "[i]t may be appropriate to provide some protection to the state and local governments" (429 F.Supp. at 706).

In response to the district court's request, the Secretary of Labor submitted a proposal to amend his statement of FLSA enforcement policy, 29 C.F.R. Pt. 775, so as to provide for listing of government activities deemed to lie outside the scope of the states' Tenth Amendment immunity from application of the FLSA. The Secretary's proposal also indicated that he would not seek double damages for violations as to any period prior to the listing of a government activity as covered by the Act. The Secretary's proposal was approved by the district court (*National League of Cities* v. *Marshall*, 429 F.Supp. at 706) and was published as an interpretative rule. See 29 C.F.R. 775.2(b) and (d) and 775.3(b).[2]

The new 29 C.F.R. § 775.2(b) provided in presently pertinent part that the Secretary

> will not file suit to enforce the minimum wage and overtime compensation provisions of the FLSA against a State or its political subdivision unless at least 30 days notice has first been given that, in the opinion of the [Wage and Hour] Administrator, the activities in question are not integral operations in areas of traditional governmental functions. Such notice will be provided either by specific notification of the employing body in question or by general notification by publication in the Federal Register in the form of amendments to Section 775.3.

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[2] Brief for the Secretary of Labor, Nos. 82-1913 and 82-1951 at 6 (emphasis added).

In 1979, such notice was given to Respondent SAMTA and public operators of local mass transit systems generally, as we describe below.

B. *Garcia I* and the Present Litigation

1. *Initiation of SAMTA's Declaratory Judgment Suit and of the Present Case*

Respondent San Antonio Metropolitan Transit Authority ("SAMTA") is a regional transit authority created pursuant to Texas law to serve the San Antonio metropolitan area. The Wage and Hour Division, acting in response to a specific inquiry about the applicability of the FLSA to employees of SAMTA, rendered an opinion "that the operations of the San Antonio Transit System are not constitutionally immune from the application of the Fair Labor Standards Act." (Opinion WII-499, dated September 17, 1979, reprinted in Wage Hour Manual (BNA) 91: 1138-1140.) That opinion was confirmed on December 21, 1979, when the Wage and Hour Division's enforcement policy was amended to include local mass transit systems in the category of government activities not integral to a traditional governmental function and hence subject to the FLSA. See 29 C.F.R. § 775.3(b)(3).

On November 21, 1979, SAMTA filed an action for a declaratory judgment against the Secretary of Labor seeking a determination that SAMTA is exempt from the provisions of the FLSA. That action ultimately came to this Court and was decided *sub nom. Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) (hereinafter *"Garcia I"*). On that same date, petitioners Joe G. Garcia and his fellow employees instituted an action in the district court against SAMTA for overtime pay and liquidated damages under § 16(b) of the FLSA. That action—which is the present case—was stayed pending disposition of SAMTA's declaratory

judgment action, in which Garcia was permitted leave to intervene as a defendant.

2. *The Proceedings in* Garcia I

In November 1981, the district court (Shannon, J.) denied the Secretary of Labor's motion for partial summary judgment and entered judgment for SAMTA. That court's judgment stated that local, publicly operated mass transit systems such as SAMTA "constitute integral operations in areas of traditional governmental functions" for purposes of applying the rule of *National League*. The Secretary and Garcia appealed to this Court, which vacated the district court's judgment and remanded the case for further consideration in light of the intervening decision in *Transportation Union* v. *Long Island R. Co.*, 455 U.S. 678 (1982). *Donovan v. San Antonio Metropolitan Transit Authority*, 457 U.S. 1102 (1982).

On remand, Judge Shannon reaffirmed his prior conclusion,[3] and the Secretary and Garcia returned to this Court. Both urged, in accordance with DOL's 1979 interpretive rule, that under the standard established in *National League* a publicly owned and operated mass transit system is subject to regulation under the FLSA; the case was argued on this issue at the 1983 Term. At the close of that term this Court, *sua sponte*, set the case for reargument and directed the parties to brief additionally the question: "Whether or not the principles of the Tenth Amendment as set forth in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), should be reconsidered?" 468 U.S. 1213 (1984).

On February 19, 1985, this Court decided *Garcia I* by overruling *National League* and holding that Congress may constitutionally apply the FLSA to all state and

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[3] *San Antonio Met. Transit Authority* v. *Donovan*, 557 F.Supp. 445 (W.D. Tex., 1983).

local government employees. The judgment of the district court was reversed, and the cases were remanded to that court for further proceedings consistent with this Court's opinion. See 469 U.S. at 557.

3. *The Subsequent Proceedings in This Case*

On the remand to the district court, the parties agreed to dismiss *Garcia I* and to litigate all liability issues in this FLSA § 16(b) action, *Garcia II*, which, as noted earlier, had been stayed during litigation of *Garcia I*. On cross-motions for summary judgment, the district court dismissed the complaint. Judge Prado concluded that *Garcia I* should not be applied retroactively to govern this case; then, applying the standard of *National League*, he adopted Judge Shannon's position that "plaintiffs performed a traditional government function and were therefore exempt from federal overtime requirements before the *Garcia* ruling." A. 26a.

The Court of Appeals affirmed. That court concluded that the retroactivity of *Garcia I* was to be determined according to the tests stated in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97; in so ruling, the court rejected petitioners' contention that the common law standards of *Chevron* do not govern a case like the present because in the Portal Act Congress itself has established standards for determining when reliance on existing law is to be a defense. A. 7a-10a; see Point I, *infra*. Applying the *Chevron* factors, the Court of Appeals decided that *Garcia I* does not govern in this case; it rejected petitioners' submission that if *Chevron* is applicable, the employees are entitled to recover for the reason, among others, that there was no decision of this or any other court on which SAMTA could rely for the proposition that mass transit is a "traditional governmental function" and thus immune from FLSA regulation under *National League*. A. 12a-20; see Point II, *infra*.

Thereupon, the Court of Appeals affirmed the judgment in defendant SAMTA's favor. In so doing, the Court of Appeals did not consider whether the petitioners are entitled to recover under the rule which preceded *Garcia I*. Petitioners were thereby denied the right to have their claims adjudicated under the constitutional standards of either *Garcia I* or *National League*. See Point III, *infra*.

REASONS FOR GRANTING THE WRIT

The Court of Appeals' decision herein marks the latest development in two connected cases, the first of which has twice previously been before this Court. Petitioners now return to this Court because the decision below is patently wrong in its approach to important and recurring questions concerning the "reliance-on-previously-settled-law" defense; is wholly unfaithful to the Court of Appeals' obligation to defer to Congress' legislative directions; and is both perversely paradoxical and utterly unjust in its result.

In both *Garcia I*[4] and in this case the SAMTA employees argued that publicly-owned local mass transit is plainly covered by the FLSA and is *not* a "traditional governmental function" immune from federal regulation under this Court's *National League of Cities* decision.[5] In *Garcia I*, after first reversing and remanding a district court decision favorable to SAMTA, this Court ruled that the FLSA does, and constitutionally may, cover local mass transit operations. The Court, however, did so, not by further elucidating the *National League of Cities* test but by raising *sua sponte* the question of whether that test should be overruled and then by answering that question in the affirmative.

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[4] *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528.

[5] *National League of Cities* v. *Usery*, 426 U.S. 833.

Thus, *Garcia I* ended in a decision *wholly favorable to the SAMTA employees.* But, according to the Court of Appeals, all of that is *as nothing* and the result is that the employees do not receive a penny in lost overtime pay and are even refused a determination on the merits of their claim under either the *National League* standard—which prevailed when they brought this suit—or the new *Garcia I* precedent. That is the result according to the Court of Appeals notwithstanding

- the fact that at the time the litigation began, SAMTA was faced with the Wage and Hour Administrator's decision supporting FLSA coverage;
- the further fact that at that time, SAMTA could not point to any legal authority for its position that publicly-owned local mass transit was not covered by the FLSA;
- the further fact that there is no doubt that if *Garcia I* had been decided in the employees' favor by applying *National League of Cities* rather than by overruling that decision, the lost overtime pay would be due and owing; and
- the further fact that the three circuits which confronted the question prior to this Court's *Garcia I* decision ruled that under *National League of Cities* publicly-owned local mass transit operations were covered by the FLSA.

The decision below is thus a cruel travesty of equal justice under law rather than its embodiment, and obviously cannot be permitted to stand. Not surprisingly, that decision is not simply an affront to common sense and the needs of a soundly functioning litigation system; it is also shot through with legal error on significant and recurring legal questions.

As we show in Part I below, the Court of Appeals decided the case on its own views of the proper common-law rule regarding reliance on previously settled legal rules rather than, as is its duty, by deferring to *Congress'*

determination in the Portal Act on the exact question of when employers are entitled to such a defense in a suit under the FLSA. And, as we show in Part II, the Court of Appeals grossly misapplied and misunderstood this Court's seminal decision in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, taken on its own terms. Finally, as we show in Part III, the Court of Appeals' decision of the case in SAMTA's favor without adjudicating the merits of petitioners' claims under the constitutional standards of *either Garcia I or National League* is clearly wrong and contrary to decisions of the Third and Eleventh Circuits.

I.

In following the judge-made standards of *Chevron Oil Co.* v. *Huson, supra*, rather than those which Congress has provided as FLSA claims in the Portal Act, the decision below squarely conflicts with the decisions of this Court, most notably *Milwaukee* v. *Illinois*, 451 U.S. 304, which have established the limits on the federal courts' authority to apply common law principles. The error is so fundamental—and the misapplication of *Chevron* beyond its intended scope of such widespread significance—as to warrant review by this Court.

A. In the Portal Act, Congress expressly detailed the circumstances under which employers are to be relieved from liability for violations of the FLSA where a judicial decision has upset their expectation that their conduct was lawful. Finding that the FLSA "has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation" (Portal Act § 1(a)), Congress wiped out a vast number of pre-existing claims. Congress went on to enact in § 10a, a carefully balanced—and tightly limited—exemption from liability for the failure to pay FLSA minimum wages or overtime compensation where the employer

> pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the agency of the United States specified in subsection (b) of this section, or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged.[6]

Congress thereby established the conditions under which a change in the law would be a defense in a suit under § 16(b) of the FLSA for acts or omissions after the effective date of the Portal Act.

The DOL enforcement policy which was published in response to the *National League* decision (see pp. 2-3, *supra*) meshed with Portal Act § 10. That policy provided a defense to SAMTA and other mass transit employers in accordance with § 10 against post-*National League* claims under the FLSA *during the period in which such employer could, in fact, rely thereon as provided in 29 C.F.R. § 775.2(b).* SAMTA itself expressly invoked § 10 in the court below in order to bar liability "[b]etween the date of the Supreme Court's decision in *National League* and the [DOL] 1979 transit determination", pointing to an affidavit that SAMTA relied on DOL's policy or practice in this regard in not conforming its pay practices to the FLSA.[7] But once an em-

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[6] So too, "as part of its response to this Court's expansive reading of the FLSA, Congress enacted the 2-year statute [of limitations] to place a limit on employers' exposure to unanticipated contingent liabilities." *McLaughlin* v. *Richland Shoe Co.*, —— U.S. ——, 108 S.Ct. 1677, 1680 (May 16, 1988), footnote omitted. See also, *e.g.*, § 11 of the Portal Act, which provides that the court may, in its sound discretion, reduce or eliminate an award of liquidated damages under § 16 of the FLSA "if the employer shows to the satisfaction of the court that the act or omission was not a violation of the [FLSA]."

[7] Brief of Defendant-Appellee in the court below at 57-58. Since SAMTA did not comply with § 7 of the FLSA with respect to its

ployer was specifically notified that in the Administrator's opinion local mass transportation systems are *not* integral operations in an area of traditional governmental functions (see p. 4, *supra*) (or, absent such notification, when 29 C.F.R. § 775.3 was amended to so declare) the Portal Act disallowed the defense.

B. Since Congress has legislated on the subject, the courts are not free to substitute their own views as to when reliance on prior law should provide a defense to a suit under the FLSA. *Milwaukee* v. *Illinois*, *supra*, carefully explains why this must be so, given the respective functions of Congress and the courts:

> Federal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision. (Citations omitted.) The enactment of a federal rule in an area of national concern * * * is generally made not by the federal judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives in Congress. [451 U.S. at 312-313.]

While acknowledging that "the Court has found it necessary, in a 'few and restricted' instances, to develop federal common law" (451 U.S. at 313, citations omitted), the Court made clear the limits and an extraordinary character of this function:

> Nothing in this process suggests that courts are better suited to develop national policy in areas governed by federal common law than they are in other areas, or that the usual and important concerns of an appropriate division of functions between the

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employees' overtime even after being notified of DOL's new enforcement policy, there is a question as to whether its previous omission in this regard was "in good faith in conformity with and in reliance on" the earlier enforcement policy; that is a question which should have been decided by the district court in accordance with Portal Act standards.

> Congress and the federal judiciary are inapplicable. We have always recognized that federal common law is "subject to the paramount authority of Congress." * * * It is resorted to "[i]n absence of an applicable Act of Congress," * * * and because the Court is compelled to consider federal questions "which cannot be answered from federal statutes alone." * * * Federal common law is a "necessary expedient," * * * and when Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears. * * * [F]ederal common law applies "[u]ntil the field has been made the subject of comprehensive legislation or authorized administrative standards" * * *. [451 U.S. at 313-314, citations omitted.] [8]

This principle governs this case. The Court of Appeals' attempts to evade it are manifestly inadequate. That court declared it to be a "problem with Garcia's argument," that "there is little support for the proposition that *Chevron Oil Co.* v. *Huson, supra*, as a doctrine of federal common law, can *never* apply when a judicial decision changes the reach of a congressional statute." A. 7a-8a, emphasis added. No such broad proposition was advanced. Our position was and remains simply that *Chevron* is inapplicable where Congress has legislated a rule determining whether a defense is available for reliance on prior law, and that in the Portal Act Congress has so legislated with respect to claims brought under the FLSA.[9] The cases cited below, wherein an Establishment

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[8] See also, *e.g., Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 95, n.34: "Thus, once Congress addresses a subject, even a subject previously governed by federal common law, the justification for lawmaking by the federal courts is greatly diminished. Thereafter, the task of the federal courts is to interpret and apply statutory law, not to create common law."

[9] By its terms, § 10 of the Portal Act also governs claims for minimum wages or overtime compensation under the Walsh-Healey Act, 41 U.S.C. §§ 35 *et seq.*, and the Bacon-Davis Act, 40 U.S.C.

Clause ruling [10] and interpretations of Title VII of the 1964 Civil Rights Act affecting pension plans [11] were declared to be nonretroactive, are simply irrelevant because neither the Constitution nor any statute declares a rule respecting the retroactivity of decisions in these contexts.[12]

The court below said also that "[e]ven if *Chevron* is a doctrine of federal common law there is no statute that sets a Congressional policy on retroactivity contrary to *Chevron*." Yet that court did not even mention § 10 of the Portal Act, on which petitioners had predicated their argument (see A. 7a), let alone demonstrate that § 10 does not "address the problem of retroactivity." *Id.* The court could not have done so. Indeed, SAMTA urged that "§ 10 of the Portal-to-Portal Act bars any liability prior to the Department of Labor's 1979 transit determination." See p. 10, *supra*.

There is likewise no merit to the further objection that our position

> would never allow a decision holding a new rule of constitutional or statutory interpretation nonretroactive. The new rule, as the definitive expression of the meaning of either the Constitution or a statute, would naturally override any common law principles favoring nonretroactivity. [A. 9a.]

This criticism is fallacious. The court below simply failed to differentiate between the content of "the new

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§§ 276a *et seq.* Section 10 of the Portal Act is also applicable to claims under the Age Discrimination in Employment Act by § 7(e) of the ADEA, 29 U.S.C. § 626(e)(1).

[10] *Lemon* v. *Kurtzman*, 411 U.S. 192.

[11] *Arizona Governing Committee* v. *Norris*, 463 U.S. 1073, and *Los Angeles Dept. of Water & Power* v. *Manhart*, 435 U.S. 702.

[12] *Chevron* itself involved the retroactivity of a decision affecting a claim under the Outer Continental Shelf Lands Act, 67 Stat. 462, 43 U.S.C. §§ 1331 *et seq.* That statute does not speak to the question of retroactivity.

rule"—that is, the new constitutional principle or statutory interpretation whose retroactivity is at issue—and the standards for determining whether or not that rule should apply retroactively. The latter issue is one which Congress has addressed in some statutory contexts, such as suits under the FLSA (and other statutes encompassed directly or indirectly by § 10 of the Portal Act; see pp. 12-13, n.9, *supra*), and elsewhere, as in the Internal Revenue Code, 26 U.S.C. § 7805(b), and (with regard to credit transactions) in the Truth in Lending Act, 15 U.S.C. § 640(f). In other statutory contexts, Congress has been silent, leaving the courts free—by necessity—to establish their own standards, but only until Congress chooses to legislate on the subject. The Court of Appeals' approach renders nugatory such Congressional judgments by insisting that the *Chevron* common law standards apply notwithstanding what Congress has done.[13]

II.

In concluding that SAMTA's failure to comply with the FLSA is not actionable, the Court of Appeals seriously misapplied each of the three *Chevron* factors. As we shall show, that court's reasoning expands *Chevron's* nonretroactivity doctrine beyond the limits recognized in any prior cases, misstates the purpose of the rule in *National League of Cities* and disregards statutory policy.

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[13] The court below quoted *United States* v. *Johnson*, 457 U.S. 537, 563, for the proposition that " 'all questions of civil retroactivity [are] governed by the standard enunciated in *Chevron Oil*' * * * whether they concern statutes, the common law, or even the Constitution." A. 10a. But the broad language of *Johnson* does not justify the Court of Appeals' ruling since no decision of this Court has applied judicially-created retroactivity standards in the face of a statute which declares when reliance on existing law may be asserted as a defense. Cf. *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 341 ("[T]he language of an opinion is not always to be parsed as though we were dealing with language of a statute.")

A. While recognizing that justified reliance on prior law is the essence of the first *Chevron* factor, the court below established a novel standard for measuring such reliance which is so loose as to vitiate "the usual rule • • • that federal cases should be decided in accordance with the law existing at the time of decision." *Goodman* v. *Lukens Steel Co.*, 107 S.Ct. 2617, 2621 (June 19, 1987).

The key to analysis of the reliance issue under the first *Chevron* factor is that SAMTA's claim of constitutional immunity depended not on one but on two propositions: (1) A local governmental body is immune from the FLSA with respect to its operation of any "traditional governmental function," and (2) the operation of a mass transit system is a "traditional governmental function." SAMTA was entitled to rely on the first of these propositions, which was established in *National League* until that decision was overruled in *Garcia I*. However, the second of these propositions had not been established by this Court, or even suggested in *dictum*, in any case. There was, in fact, no decision of any court so much as suggesting that mass transit is constitutionally immune from the FLSA. Indeed, SAMTA knew, at least from the time the Transit Authority received the DOL opinion which prompted SAMTA's declaratory judgment suit, that the status of mass transit as a "traditional governmental function" was an unsettled question of law, like countless others.

Nevertheless, the court below concluded that SAMTA satisfied the first *Chevron* factor. As that court framed the issue, "whether SAMTA was entitled to rely on *National League of Cities* in failing to follow the FLSA depends upon whether public mass transit is a traditional state function or a nontraditional one" (A. 14a); but the court then concluded that it is "impossible for us to make such a determination one way or the other • • • because the Supreme Court has explained that the *Na-*

tional League of Cities doctrine was 'unsound in principle and unworkable in practice.'" (A. 15a, quoting 469 U.S. at 546.)

This perceived dilemma was solely of the Court of Appeals' own making. That court incorrectly propounded an *ex post facto* inquiry into what the ultimate outcome would have been if this Court had applied *National League* standards to mass transit functions. Given that *National League* had determined that only "traditional governmental functions" qualified for immunity, the real issue was whether, *at the time SAMTA acted*, there was any decision on which the Transit Authority was entitled to rely for the proposition that mass transit operations were such a function.

Having posed the wrong question, and finding that *Garcia I* foreclosed an answer thereto, the court below continued:

> We believe, however, that the equitable nature of the *Chevron* test gives it enough flexibility to allow us to reach a conclusion as to whether [*Garcia I*] should be applied retroactively. [A. 15a.]

That court answered this question in SAMTA's favor by positing a series of "right[s]" which it believed SAMTA enjoyed:

> SAMTA was relying on the general framework provided by *National League of Cities*, as it undoubtedly had a right to do. SAMTA also had a right to pursue its claim that it was exempt from the FLSA through the courts, and to the Supreme Court if necessary, to obtain a final resolution. Once it had obtained a district court decision in its favor, SAMTA definitely had a right to rely on that decision unless it was overturned. [A. 15a-16a.]

We unhesitatingly agree that SAMTA had a "right" to litigate the question whether "it was exempt from the FLSA through the courts * * *." But nothing in *Chevron*

or any other case gave SAMTA the "right" not to pay overtime and to litigate on the basis that the Transit Authority would be relieved of liability *even if it should ultimately be determined that SAMTA was not immune.* No "reliance" doctrine can sanction such a "heads I win, tails you lose" posture.

Nor does *Chevron* declare a "right" to "rely[] on the general framework" of a precedent. Because constitutional doctrines almost invariably provide a "framework" for deciding related questions, the radiations of any overruling decision provide a plausible argument by countless parties that they would have prevailed under the original precedent even though the outcome was so uncertain under the old precedent that reliance thereon was unwarranted. And, of course, nothing in *Chevron* would justify reliance by SAMTA, first on its own views as to whether mass transit is a traditional governmental function, and thereafter on the decision of the district court in its own case during the appeal thereof and even after that decision had been vacated by this Court on the basis of the *Transportation Union* case (see p. 5, *supra*).[14]

In sum, the *Chevron* test does not and should not have "enough flexibility" to accommodate the Court of Appeals' approach, which expands nonretroactivity doctrine far beyond the point where principled application is possible, and trivializes the requirement for justifiable reliance which underlies *Chevron's* "equitable nature".

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[14] The court below wholly disregarded the period between the commencement of SAMTA's declaratory judgment suit and the first district court decision, and between the time that decision was vacated by this Court and the district court's reaffirmation of its original views. On what did SAMTA then rely? The court also failed to consider whether reliance on a district court's decision was justifiable—let alone prudent, in terms of budgetary planning, see A. 19a-20a, discussing the equities—in the face of consecutive rulings by three Circuits that mass transit is not a "traditional governmental function." See cases cited 469 U.S. 530, n.1.

B.(1). The Court of Appeals determined that the second prong of the *Chevron* test, whether "retrospective operation will further or retard [the] operation" of the new rule (see 404 U.S. at 107), is "neutral" (A. 16a). That conclusion was based on characterizing *Garcia I*'s purpose as "compelling future FLSA compliance" by state and local governments. This characterization of *Garcia I* is far too narrow. The core holding of *Garcia I* is that the Commerce Clause empowers Congress to subject states and their political subdivisions to regulation under the FLSA. Operation of that rule is unquestionably "retard[ed]" by a decision which denies relief for past violations of the FLSA. This Court has made it plain that making employees whole by vindicating claims for minimum wages or overtime premiums which were withheld in violation of the FLSA, is a major element of Congressional policy. See *Barrentine* v. *Arkansas-Best Freight System*, 450 U.S. 728, 739-741, and cases cited *id.*[15]

We recognize that two other circuits have likewise concluded that the second *Chevron* factor is neutral with respect to the retroactive application of *Garcia I*.[16] But we submit that Judge Becker's dissent from that view captured the essence of the matter:

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[15] Congress decisively manifested its concern that FLSA violations should not go unremedied after this Court held, in *Employees* v. *Missouri Public Health Dept.*, 411 U.S. 279 (1973), that the private remedy in § 16(b) is not available against states and local governments. First, Congress amended § 16(b) by specifying that such suits may be "maintained against any employer (including a public agency), in any Federal or State Court"; and second, it added § 6(d) to the Portal Act, suspending the statute of limitations, "in order to preserve existing actions * * * which would otherwise be barred by the statute of limitations as a result of the [*Missouri*] decision." See House Rpt. No. 93-913, [1974] U.S. Code Cong. and Adm. News 2811 at 2850.

[16] *Mineo* v. *Port Authority of New York and New Jersey*, 779 F.2d 939, 945 (C.A. 3); *Ackinclose* v. *Palm Beach County, Fla.*, 845 F.2d 931, 935 (C.A. 11).

> Moreover, this court's continued recognition of exemptions in the coverage of the FLSA that were created solely by the judicial branch and have since been invalidated would constitute an unjustifiable intrusion into the legislative branch's authority and an unwarranted divergence from congressional intent.[17]

(2). As Judge Becker also said with respect to the second *Chevron* factor:

> I believe that non-retroactive application of *Garcia* results in the unseemly spectacle of the court's deciding this case under a pre-existing analytical framework that the Supreme Court has found to be unsound in principle and unworkable in practice. *Garcia*, 105 S.Ct. 1016. Thus, in Part IV of its opinion the majority is forced to apply an analysis that the Supreme Court has denigrated as "not faithful to the role of federalism in a democratic society" and "disserve[ing] principles of democratic self-governance." *Id.* at 1015, 1016. [779 F.2d at 954, footnote omitted.]

As we have seen, the court below, too, understood that repudiation of the "traditional governmental function" test in determining the "limits on the Federal Government's power to interfere with state functions" (469 U.S. at 547) was a principal objective of the decision to overrule *National League*. Yet that court below inexplicably failed to grasp what Judge Becker so lucidly stated: *viz.*, that it would defeat the purpose of this rule to apply *Garcia I* only prospectively and decide pending cases under the *National League* standard.[18]

C. The Court of Appeals determined that the third *Chevron* factor—a balancing of the equities of parties—favored nonretroactivity for "two basic reasons". A. 19a.

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[17] *Mineo, supra*, 779 F.2d at 954 (dissenting opinion).

[18] The alternative silently adopted by the court below—to dismiss the petitioners' claims without applying the rule of either *National League* or *Garcia I*—is wholly unprincipled and must be rejected for the reasons stated in point III hereof, pp. 22-24, *infra*.

The Court of Appeals' first reason depends on its assertion that SAMTA justifiably acted and planned its budget [19] on the assumption that the transit authority was not required to comply with the FLSA. But SAMTA did not "suddenly find[] out that contrary to precedent of the Supreme Court" (A. 19a) SAMTA was subject to regulation under the FLSA; there *never was* a precedent which established that *SAMTA* was immune. Nor was SAMTA justified in relying—if it actually did rely, rather than merely take its chances—on the "decisions of the district court" (*id.*) in this case. We shall not reiterate our discussion at pp. 16-17, *supra*, on this point, but in considering the equitable component of the *Chevron* test, one additional observation is appropriate:

If Garcia and the Secretary of Labor had prevailed in SAMTA's declaratory judgment suit on the ground that mass transit is not a traditional governmental function, the suggestion would not have been seriously entertained that it is inequitable for the employees to recover in this companion suit for back pay. The respective equities of the parties are not affected one iota by the circumstance that this Court reached the same result by overruling *National League*. Since the outcome was *not* "contrary to precedent of the Supreme Court", there simply was no justifiable reliance which could create equities in SAMTA's favor.

The Court of Appeals' second reason for resolving the equities against SAMTA's employees was "that what SAMTA employees have not received in overtime compensation over the past several years, they have received *at least partially* in other forms."[20] A. 20a, emphasis

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[19] The lower courts' dire predictions as to the potential adverse impact which a decision in petitioners' favor would have on SAMTA's budget is unsupported by any findings as to either SAMTA's potential liability or its relationship to SAMTA's total budget.

[20] Of course, SAMTA's back-pay liability would be reduced to the extent that its employees have already received overtime pay

added. In this respect, the court pointed (a) to negotiations between SAMTA and the employees' union representative (A. 18a); and (b) to its view that "SAMTA must compete for labor in the marketplace against employers who are subject to the FLSA, and so it could not simply subtract the benefits required by the FLSA from its own programs." A. 20a.

The illegality of public sector collective bargaining in Texas renders illusory the Court of Appeals' notion that there were arms-length negotiations between the parties; and there is nothing in the record about operation of the labor market in the San Antonio area which might warrant a surmise that SAMTA's employees enjoy sufficient job mobility as to require SAMTA to match the benefits paid other employees.[21]

But the major vice of the lower court's speculations is its failure to respect "the duty of the common-law court to perceive the impact of major legislative innovations and to interweave the new legislative policies with the inherited body of common-law principles—many of them deriving from earlier legislative exertions."[22] For, in balancing the equities between SAMTA and its employ-

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which satisfied the FLSA requirements. The issue here is whether the *employees* must absorb the shortfall.

[21] The court below simply *assumed* that these employees could find appropriate alternate employment, although it appears that for trained bus drivers, SAMTA is the only game in town. More generally, employees who have invested many years on a job must usually sacrifice seniority, accumulated pension credits and other earned emoluments if they obtain other employment.

[22] *Moragne* v. *States Marine Lines*, 398 U.S. 375, 392 (Harlan, J.). See also *id.* at 390:

> Th[e] legislative establishment of policy carries significance beyond the particular scope of each of the statutes involved. The policy thus established has become itself a part of our law, to be given its appropriate weight not only in matters of statutory construction but also in those of decisional law.

ees, the court below rested on its own economic theories and value judgments, notwithstanding that Congress has unmistakably adopted opposite policies.

Whereas the court below relied on SAMTA-union "negotiations," it is well settled that even where wage and hour standards which fail to satisfy FLSA requirements are accepted by employees in an agreement reached by genuine collective bargaining, liability under the FLSA is not excused. See *Barrentine, supra,* 450 U.S. at 740-741, and cases cited *id.*[23] More fundamentally, in enacting the FLSA, the National Labor Relations Act and other major protective legislation, Congress necessarily rejected the theory that labor markets are efficient and provide employees with bargaining power equal to that of employers.

In sum, by disregarding Congressional policies when it balanced the equities the court below compounded the error which it made when it chose to apply *Chevron's* standards rather than those established in the Portal Act: It disrespected the primacy of the Legislature in formulating public policy.

III.

Having concluded that the decision in *Garcia I* should be applied only prospectively, the Court of Appeals did not go on to consider petitioners' alternative contention that their claims should be sustained under pre-*Garcia I* law, that is, under the standards of *National League.*

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[23] When Congress wishes to authorize collectively bargained exceptions to the FLSA's overtime requirements, it does so with specificity. *Barrentine,* 450 U.S. at 741-742, n.19. See also FLSA § 7(o), permitting agreements for compensatory time in lieu of overtime for employees of a public agency. This provision was added by § 2(a) of the Fair Labor Standards Amendments of 1985, 99 Stat. 787.

Rather, that court dismissed those claims without further explanation. That Catch-22 approach demeans the law.

Under the Court of Appeals' decision this Court's affirmation in *Garcia I* that Congress may constitutionally create claims under the FLSA against state employers regardless of the function the employees perform operates not to vindicate the SAMTA employees' claims under the FLSA but to eradicate those claims. While the Court's *Garcia I* holding is given only prospective effect, a portion of its analysis is applied retroactively. Petitioners are deprived of their basic right to persuade the courts that their claims are valid *under some law*—be it that of *National League* or that of *Garcia I*.[24]

Not surprisingly, the two other courts of appeals which have held that *Garcia I* is not retroactive did not automatically dismiss the plaintiffs' claims. As we observed earlier, the Third Circuit in *Mineo* proceeded to decide whether the plaintiffs there were entitled to recover under the *National League* doctrine. More recently, the Eleventh Circuit remanded that question to the district court. *Ackinclose* v. *Palm Beach, Fla.*, 845 F.2d 931 (1988). In so ruling, that court noted and severely criticized the Fifth Circuit's decision herein:

> It is true that *Garcia* prospectively swept away the unworkable traditional governmental function test for FLSA coverage in state and local government. Nevertheless, the Supreme Court's rejection of the troublesome *National League of Cities* standard did not somehow erase the protection the Act afforded individuals working in areas outside of the traditional governmental function sphere prior to the April 15, 1985 mandate in *Garcia*.
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[24] Putting the matter in the Court of Appeals' own terms, if SAMTA was entitled to "rely[] on the general framework provided by *National League*" (A. 15a), why not its employees also?

> If we were to hold that the traditional governmental functions criterion could not be applied on remand, appellants' FLSA claim would effectively be mooted without a determination having been made as to whether they were covered by the Act during the period of time their suit covers. That is an incongruous result we cannot embrace. [845 F.2d at 938, n.6.]

Despite its sharp disagreement with the decision in this case, the Eleventh Circuit said that "we see no direct conflict between the result reached here and the above-cited opinion of the Fifth Circuit." *Id.* But the difference to which the Eleventh Circuit pointed—that the present case arises "on remand in the very case in which [the] new rule [concerning the reach of §§ 6 and 7 of the FLSA] was set down" (*id.*)—is wholly unrelated to the legal issue on which the courts squarely differed: *viz.*, the issue of whether the plaintiffs in the respective cases are entitled to have their claims considered under *National League*, if not under *Garcia I*.[25]

Accordingly, the genuineness of the conflict of decisions in this regard between the Fifth Circuit and the Third and Eleventh Circuits cannot be gainsaid. And putting that point aside, dismissal of the SAMTA employees' claims without adjudicating their merits under either *Garcia I* or under the prior overruled precedent is so inconsistent with the equitable nature of the *Chevron* doctrine, and so contrary to the accepted and ordinary course of judicial proceedings as to call out for review by this Court.

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[25] The court below addressed this circumstance only to reject the submission that petitioners are, for that additional reason, entitled to the benefits of the new rule. [A. 10a-12a.]

CONCLUSION

For the foregoing reasons, this Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 87-5526

JOE G. GARCIA, On Behalf of Himself and Others Similarly Situated,
Plaintiffs-Appellants,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY,
Defendant-Appellee.

March 9, 1988

Appeal from the United States District Court
for the Western District of Texas

Before THORNBERRY, POLITZ and JOLLY, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

Joe G. Garcia appeals the district court's decision granting the motion of the San Antonio Metropolitan Transit Authority ("SAMTA") for summary judgment and denying his own. For the following reasons, we affirm the judgment of the district court.

I

SAMTA is the governmental body that runs the public transit system in San Antonio, Texas. The plaintiffs (collectively, "Garcia"), employees of SAMTA, brought this action in 1979 for back pay and liquidated damages attributable to SAMTA's violation of the Fair Labor Standards Act ("FLSA"). The historical context for the current appeal is unusually complex.

In 1974, Congress amended the FLSA to repeal the exemption from the minimum wage and overtime provisions for all state and local government employees. In 1976, however, the Supreme Court curtailed the application of the FLSA to state and local governments, holding that principles of federalism prevented Congress under the commerce clause from regulating "integral operations in areas of traditional governmental functions." *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 2474, 49 L.Ed.2d 245 (1976). The court did not attempt, however, to enumerate all the governmental activities that were exempt from federal regulation. Instead, the Court merely listed "fire prevention, police protection, sanitation, public health, and parks and recreation" as examples of protected functions. The Court did not address the status of government-owned mass transit systems.

After the 1976 decision in *National League of Cities*, SAMTA notified its employees that it would no longer abide by the FLSA's maximum hours and overtime provisions. The Department of Labor, which was charged with the enforcement of the FLSA, made no attempt to enforce the overtime provisions against any public transit system until September 17, 1979, when it informed SAMTA that it did not consider the operation of a public transit system a "traditional governmental function" protected under *National League of Cities*. Shortly afterward, SAMTA filed a declaratory judgment action

against the Secretary of Labor, seeking reversal of the Department's decision. The same day and in the same district court, Garcia brought the case now on appeal, an action for back pay and liquidated damages because of SAMTA's claimed violation of the FLSA.[1]

The district court stayed Garcia's case while the parties litigated *SAMTA I*. In 1981, the district court rendered summary judgment for SAMTA against the Secretary, holding that SAMTA's operation of a public mass transit system was protected from federal regulation under *National League of Cities*. The Supreme Court, however, vacated the judgment and remanded the case for reconsideration in the light of the intervening decision of *UTU v. Long Island Railroad*, 455 U.S. 678, 102 S.Ct. 1349, 71 L.Ed.2d 547 (1982), which held that a railroad that carries passengers and freight is not protected by *National League of Cities*. In February 1983, however, the district court again ruled for SAMTA, adhering to its view that mass transit was a traditional governmental function and distinguishing *Long Island Railroad*. On appeal, the Supreme Court reversed, overruling *National League of Cities* and holding that Congress could constitutionally apply the FLSA to all state and local government employees. *Garcia v. SAMTA*, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985). On remand to the district court, the parties agreed to dismiss *SAMTA I* and to litigate *SAMTA II*, which had been stayed during the entire litigation of *SAMTA I*. The dismissal allowed the Secretary of Labor to exit the dispute.

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[1] The district court allowed Garcia, the plaintiff in the second case, to intervene in SAMTA's action against the Secretary. Thus, both cases confusingly bear the name *Garcia v. SAMTA*. For that reason, we call the case that SAMTA brought against the Secretary of Labor *"SAMTA I"* and the case that Garcia brought, *"SAMTA II,* 557 F. Supp. 445."

With *SAMTA I* dismissed by agreement in the district court, both parties moved for summary judgment in Garcia's original action. SAMTA argued that the Supreme Court's decision in *SAMTA I* should not be applied retroactively under the facts of the case; therefore, the court should apply the old *National League of Cities* test to exempt SAMTA from liability. Garcia argued that *SAMTA I* should be applied, and that therefore SAMTA was liable for back pay and liquidated damages because of its violation of the FLSA. The district court granted SAMTA's motion and denied Garcia's.

II

In *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 2474, 49 L.Ed.2d 245 (1976), the Supreme Court held that "insofar as the challenged [FLSA] amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress" by the commerce clause. As examples of traditional state functions exempt from federal regulation, the Court listed "fire prevention, police protection, sanitation, public health, and parks and recreation." *Id.* The Court noted, however, that the examples it suggested were "obviously not an exhaustive catalogue of the numerous line and support activities which are well within the area of traditional operations of state and local governments." *Id.* n. 16.

It soon became apparent, however, that courts would have difficulty in applying *National League of Cities* consistently in deciding which state functions were "integral operations in areas of traditional [state] governmental functions." As the Court later noted,

> Just how troublesome the task has been is revealed by the results reached in other federal cases. Thus, courts have held that regulating ambulance services, licensing automobile drivers, operating a municipal

> airport; performing solid waste disposal, and operating a highway authority, are functions *protected* under *National League of Cities.* At the same time, courts have held that issuance of industrial development bonds, regulation of intrastate natural gas sales, regulation of traffic on public roads, regulation of air transportation, operation of a telephone system, leasing and sale of natural gas, operation of a mental health facility, and provision of in-house domestic services for the aged and handicapped, are *not* entitled to immunity. We find it difficult, if not impossible, to identify an organizing principle that places each of the cases in the first group on one side of a line and each of the cases in the second group on the other side.

Garcia v. SAMTA, 469 U.S. 528, 105 S.Ct. 1005, 1011, 83 L.Ed.2d 1016 (1985). Based in part on the practical difficulty in applying *National League of Cities*, the court in *SAMTA I* overruled that decision, holding instead that the states were adequately protected against unreasonable federal interference by their substantial role in constituting the federal government. *Id.* 105 S.Ct. at 1016-20. Congress reacted to the overturning of *National League of Cities* by amending the FLSA to eliminate retroactive liability for functions already categorized as "traditional," but did not take a position on retroactivity as to other government functions such as the transportation function presented in this case. Fair Labor Standards Amendments of 1985, Pub.L. No. 99-150, 99 Stat. 787 (1985), §§ 2(c), 7. *See also* S.Rep. 159, 99th Cong., 1st Sess. 15 (1985); H.R.Rep. No. 331, 99th Cong., 1st Sess. 27-28 (1985), U.S. Code Cong. & Admin. News 1985, p. 651.

In the present case, the district court refused to apply *SAMTA I* retroactively. Instead, using the analysis of *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), the court concluded that *SAMTA*

I should be applied prospectively only. *Chevron* identified three factors which courts should consider in deciding whether to recognize an exception to the general rule that the applicable law is that in effect at the time of the decision:

> First, the decision to be applied nonretroactively must establish a new principle of law, . . . by overruling clear past precedent on which litigants may have relied. . . . Second, it has been stressed that "we must * * * weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Finally, we have weighed the inequity imposed by retroactive applications, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

Id. 92 S.Ct. at 355.

In applying the *Chevron* analysis, the district court found that the first factor favored nonretroactivity, because *SAMTA I* had overruled a clear past precedent upon which SAMTA had "reasonably relied." The second factor favored neither, because *SAMTA I* would be fully enforced in the future regardless of the outcome of the decision to apply it retroactively. The third factor strongly favored nonretroactivity, as SAMTA had "structured its conduct based on the reasonable belief that its employees performed a traditional government function. Wage rates and benefit packages were negotiated based on this premise." The complete *Chevron* test therefore led the district court to conclude that *SAMTA I* should not be applied retroactively.

Garcia attacks the district court's decision on three grounds. First, he argues that *Chevron*, which states

a principle of mere federal common law, is inapplicable when Congress has by statute decided to apply the FLSA retroactively and that the FLSA, when read in conjunction with the Portal-to-Portal Act, 29 U.S.C. § 251 *et seq.*, sets forth the only possible defenses to a FLSA violation, and that SAMTA has not fulfilled the requirements of any of these defenses. Second, he argues that *Chevron* is inapplicable because the parties in this case are the same as those in the Supreme Court's *SAMTA I* decision, and *Chevron* cannot operate to deny to the victorious parties in *SAMTA I* the fruits of that victory. Last, he argues that even if *Chevron* is the proper standard, the district court erred in finding that *Chevron* requires nonretroactivity on the facts of this case.

III

A.

Garcia asserts that *Chevron* set forth a doctrine of federal common law concerning retroactivity of civil cases. As a doctrine of federal common law, it naturally must yield when Congress by statute has set a contradictory policy. *See Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 101 S.Ct. 1784, 1790, 68 L.Ed.2d 114 (1981). And in the case of the FLSA, Garcia argues, Congress did set a contradictory policy. By its own terms, the FLSA has unquestionably applied to most state and local government employees since 1974, although from 1976 to 1984 *National League of Cities* prevented the full enforcement of the statute. Furthermore, this court has held that the Portal-to-Portal Act, 29 U.S.C. § 259, supplies the only defenses to liability for FLSA violations. *LeCompte v. Chrysler Credit Corp.*, 780 F.2d 1260, 1262 (5th Cir.1986). SAMTA does not assert any defense based on that act.

A problem with Garcia's argument is that there is little support for the proposition that *Chevron*, as a doc-

trine of federal common law, can never apply when a judicial decision changes the reach of a congressional statute. Garcia does cite one district court opinion, *Joiner v. City of Macon*, 627 F.Supp. 1532, 1535 (M.D. Ga.1986), *rev'd in part on other grounds*, 814 F.2d 1537 (11th Cir.1987),[2] which states that the *Chevron* factors "are a compendium of federal common law principles for use in the absence of federal statutory provisions." *Joiner*'s statement, however, is dictum in view of the court's additional conclusion that the *Chevron* factors compel retroactivity of *SAMTA I*. *Id.* at 1536. The proposition is further undermined by the fact that every other court to consider the issue of *SAMTA I*'s retroactivity has employed the *Chevron* framework. *See, e.g.*, *Mineo v. Port Authority of New York and New Jersey*, 779 F.2d 939, 944 (3d Cir.1985) (finding *SAMTA I* nonretroactive); *Kukla v. Village of Antioch*, 647 F. Supp. 799, 815-16 (N.D.Ill.1986) (same); *Thurmond v. City of Union City*, 628 F.Supp. 146, 148 (W.D.Tenn. 1986) (same).

Garcia's argument also suffers from problems of illogic. Even if *Chevron* is a doctrine of federal common law, there is no statute that sets a Congressional policy on retroactivity contrary to *Chevron*. Here, as in most cases when the Court decides to overrule a precedent, the Constitution and statutes fail to address the problem of retro-

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[2] Another source of possible support for this argument is the opinion of Judge Gibbons dissenting from the denial of rehearing en banc. *Mineo v. Port Authority of New York and New Jersey*, 783 F.2d 42, 42 (3d Cir. 1986). A Third Circuit panel had decided originally that *Chevron* prevented *SAMTA I* from being applied retroactively in certain circumstances. 779 F.2d 939 (3d Cir. 1985). Judge Gibbons would have granted rehearing en banc because "[t]he majority relies on federal common law, of which *Chevron Oil Co. v. Huson* is a part, for its rule of decision. Federal common law, however, never can be applied in contravention of the will of Congress expressed in a duly enacted statute." 783 F.2d at 43. The en banc court, of course, did not adopt Judge Gibbons' position.

activity. As a result, courts must employ doctrines such as *Chevron* to provide a solution. If Congress had addressed the retroactivity issue regarding the mass transit function, then Garcia's argument that a statute should override the *Chevron* common law doctrine would have some force.[3]

A further difficulty with Garcia's argument is that it would never allow a decision holding a new rule of constitutional or statutory interpretation nonretroactive. The new rule, as the definitive expression of the meaning of either the Constitution or a statute, would naturally override any common law principles favoring nonretroactivity. The court would be limited under *Chevron* to considering the retroactivity of new rules of federal common law. But Supreme Court precedent belies that result. In some cases, the Court has applied *Chevron* to limit the retroactivity of cases announcing new principles of constitutional law. *See, e.g., Lemon v. Kurtzman*, 411 U.S. 192, 93 S.Ct. 1463, 36 L.Ed.2d 151 (1973) which refused to apply retroactively an earlier decision holding unconstitutional state reimbursement of religious schools for

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[3] Garcia does argue that the 1985 amendments to the FLSA set a Congressional policy on retroactivity. Those amendments did eliminate retroactive liability for the state functions that the Department of Labor's regulations had deemed "traditional" and thus exempt from the FLSA under *National League of Cities*. But section 7 of the amendments specifically states that the 1985 amendments "shall not affect whether a public agency . . . is liable under . . . [FLSA for a violation] occurring before April 15, 1986 [the date of *SAMTA I*], with respect to any employee of such public agency who would have been covered by such Act under the Secretary of Labor's special enforcement policy on January 1, 1985. . . ." Both the House and Senate Committee reports on the 1985 amendments also contain statements that Congress' intent was not to take a position on the retroactivity of *SAMTA I*, except to eliminate liability for state agencies that were exempt from the FLSA under the Labor Department regulations. S. Rep. 159, 99th Cong., 1st Sess. 15 (1985); H. Rep. 331, 99th Cong., 1st Sess. 27-28 (1985), U.S. Code Cong. & Admin. News 1985, p. 651.

some expenses. Other cases have denied retroactivity in statutory construction cases. *See, e.g., Arizona Governing Committee v. Norris,* 463 U.S. 1073, 1075, 103 S.Ct. 3492, 3494, 77 L.Ed.2d 1236 (1983) (Title VII of the 1964 Civil Rights Act); *Los Angeles Dep't of Water & Power v. Manhart,* 435 U.S. 702, 719-23, 98 S.Ct. 1370, 1380-83, 55 L.Ed.2d 657 (1978) (same). These decisions indicate that "all questions of civil retroactivity [are] governed by the standard enunciated in *Chevron Oil," United States v. Johnson,* 457 U.S. 537, 102 S.Ct. 2579, 2594, 73 L.Ed. 2d 202 (1982), whether they concern statutes, the common law, or even the Constitution. We therefore hold that *Chevron* provides the standards we must apply in this case.

B.

Garcia argues that, because the parties in the present case are the same as those in *SAMTA I,* he should not be denied the fruits of his victory in the Supreme Court by a decision not to apply that decision retroactively. He cites two cases to support his position.

In *Noble v. Drexel, Burnham, Lambert, Inc.,* 823 F.2d 849 (5th Cir.1987), this court applied the *Chevron* test to a recent Supreme Court decision concerning arbitration of securities disputes, *Shearson/American Express, Inc. v. McMahon,* —— U.S. ——, 107 S.Ct. 2332, 96 L.Ed.2d 185 (1987). We held the decision retroactive. But before doing so, we noted a "strong irony" in retroactivity analysis:

> Unavoidably, the losing party in a case which establishes new law sustains a full blast of "retroactivity," otherwise the change in law is merely precatory and without full precedential force. The second loser, however, gets the potential benefits of the analysis suggested by *Chevron Oil.* The McMahons lost first and without hope of escape. We must determine whether Mr. Noble is to suffer the same fate.

823 F.2d at 850.

In *Simpson v. Union Oil Co.*, 369 U.S. 13, 90 S.Ct. 30, 24 L.Ed.2d 13 (1969), the Supreme Court expressed a similar view. There, the Court in an earlier case had established a new antitrust rule concerning price fixing by the "consignment" device. *Simpson v. Union Oil Co.*, 377 U.S. 1051, 84 S.Ct. 1051, 12 L.Ed.2d 98 (1964). In the earlier case, the Court had reserved the question of whether the equities warranted only prospective application of its new rule. On remand, the district court interpreted this comment as authorizing it, after a consideration of the equities, to deny the benefits of the new rule to the litigant before the Supreme Court, Union Oil. After the appeal from the remand, the Court ruled:

> The question we reserved was not an invitation to deny the fruits of successful litigation of this this petitioner. . . . Formulation of a rule of law in an Article III case or controversy which is prospective as to the parties involved in the immediate litigation would be most unusual, especially where the rule announced was not innovative.

The Supreme Court's holding in *Simpson* and the Fifth Circuit's dictum in *Noble* suggested that retroactivity analysis does not apply to the parties to the case that establishes the new rule. *Simpson*, however, was decided before the Court's decision in *Chevron* established a consistent framework for retroactivity analysis. In addition, the court's comments in *Noble* were dicta, as that case did not concern the parties to the case that established the new rule. Furthermore, the tone of the cited passage indicates that this court found it inequitable that only one party would suffer from the new rule of law. Most important, since *Chevron*, other cases have applied the *Chevron* framework even to the parties to the case that established the new rule.

In *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), for example, the Court invalidated Pennsylvania's program of reimbursement of religious

schools for providing secular educational services. On remand to the district court after the Supreme Court's decision, however, the court allowed the state to reimburse the schools for services provided before the date of the *Lemon* decision, enjoining only further payments for services performed after that date. The Supreme Court affirmed, though without an opinion for the Court. Chief Justice Burger, announcing the judgment of the Court and the opinion of a four-justice plurality, cited *Chevron* in his conclusion that equitable factors warranted the nonretroactive application of the original *Lemon* ruling, even to the very parties in that case. 411 U.S. 192, 93 S.Ct. 1463, 1467-72, 36 L.Ed.2d 151 (1973). In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 102 S.Ct. 2858, 2880, 73 L.Ed.2d 598 (1982), the Supreme Court invalidated the broad grant of jurisdiction to the bankruptcy courts, but, under the *Chevron* framework, applied the judgment only prospectively to the parties in the case. *Allen v. State Bd. of Elections*, 393 U.S. 544, 89 S.Ct. 817, 835, 22 L.Ed.2d 1 (1969), held changes in Mississippi election law invalid, but refused to set aside elections already held under the law. *Zambuto v. AT & T*, 544 F.2d 1333, 1336 (5th Cir.1977), held that *Chevron* equitable factors compelled making its ruling prospective only from date of decision plus 90 days, even as to the parties in the case. Thus, we conclude that whether a decision should be made retroactively as to the parties in the original case to guarantee the prevailing party the "fruits of its successful litigation" is a factor to be considered under the third prong of the *Chevron* test: the weighing of the equities.

IV

Although in civil litigation, "[t]he usual rule is that federal cases should be decided in accordance with the law existing at the time of decision," *Goodman v. Lukens Steel Co.*, —— U.S. ——, 107 S.Ct. 2617, 2621, 96 L.Ed.2d 572 (1987), *Chevron* set up a system to evaluate when

nonretroactivity is proper, and included three factors to be considered in making that decision. The district court in this case concluded that the first *Chevron* factor—whether the new rule overruled "clear past precedent on which litigants may have "clear past precedent on which litigants may have relied"—favored nonretroactivity. The second factor—whether retroactive application will further or retard the operation of the new rule—the district court found to be neutral. Finally, the district court found that the third factor—whether retroactive application could produce substantial inequitable results—strongly favored nonretroactivity. Garcia has attacked each of these conclusions.

A.

There is no question that *SAMTA I* overruled a clear past precedent: "*National League of Cities v. Usery* is overruled." [Citations omitted], 105 S.Ct. at 1021. The real issue presented is whether SAMTA was entitled to rely on the overruled case in its decision not to follow the requirements of FLSA. *See Goodman v. Lukens Steel Co.*, 107 S.Ct. at 2621, which held that the first *Chevron* factor will favor nonretroactivity if the case overruled "clear . . . precedent on which the complaining party was entitled to rely."

We feel that the facts of this particular case prevent our making a straightforward assessment of this factor; however, all of the *Chevron* factors rely on equitable considerations which allow us to extrapolate from the principles underlying them and to apply them to the unwieldy facts here.

A straightforward assessment of this factor would be possible if we could look at *National League of Cities* and decide whether SAMTA had been entitled to rely on that case in refusing to follow the FLSA because that case had provided that mass transit was exempt from the FLSA. *National League of Cities* did not mention mass transit among the governmental functions which were exempt

from FLSA requirements, however. Instead, *National League of Cities* listed a few examples, such as police and fire protection, and then stated that traditional governmental functions such as these were exempt from the FLSA while nontraditional state functions were not exempt. Thus, whether SAMTA was entitled to rely on *National League of Cities* in failing to follow the FLSA depends upon whether public mass transit is a traditional state function or a nontraditional one. Several appellate decisions which reached this issue have held that *National League of Cities* did not protect mass transit, because that function was not traditional.[4] Additionally, the Labor Department passed a regulation effective December 21, 1979, which determined that local public mass transit system is not a "traditional" public function, and thus is not exempted from the FLSA. 29 C.F.R. § 775.2(b)(3). It was this regulation that prompted SAMTA to file this suit for a declaratory judgment.

SAMTA did have, however, numerous persuasive arguments why mass transit should have been categorized as a traditional government function and thus exempted from the FLSA. It had enough arguments, in fact, to convince the district court twice that it was performing a "traditional" function. Finally, it convinced four members of the Supreme Court in *SAMTA I*, (105 S.Ct. at 1021, Powell, J. dissenting). The majority opinion was silent on this question. Garcia argues that having only a credible position under a former precedent is not sufficient to fulfill the first prong of *Chevron*. Rather, Garcia argues that to find that SAMTA had fulfilled this *Chevron* factor in the usual manner, we would have to decide that mass transit in San Antonio was a traditional function

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[4] *Dove v. Chattanooga Area Regional Transportation Authority*, 701 F.2d 50 (6th Cir. 1983); *Alewine v. City Council*, 699 F.2d 1060 (11th Cir. 1983); *Kramer v. Newcastle Area Transit Authority*, 677 F.2d 308 (3d Cir. 1982); *Francis v. Tallahassee*, 424 So.2d 61 (Fla. App. 1982).

under the *National League of Cities* doctrine. It is impossible for us to make such a determination one way or the other, however, because the Supreme Court has explained that the *National League of Cities* doctrine was "unsound in principle and unworkable in practice." 105 S.Ct. at 1016. In that opinion, the Court spends pages showing how cases under the *National League of Cities* doctrine had reached inconsistent results and *that there was no way* "to identify an organizing principle that places each of the cases in the first group on one side of a line and each of the cases in the second group on the other side." 105 S.Ct. at 1011. It would therefore be highly ironic for us to sit as a court of appeals following *SAMTA I* and attempt to determine whether mass transit falls on one side or the other of a line that the Supreme Court has declared does not exist and, indeed, has never existed. We therefore think it inappropriate after *SAMTA I* to try to determine whether SAMTA in particular, and mass transit in general, fulfills a 'traditional" public function and was therefore exempt from FLSA prior to *SAMTA I*. With respect to the first prong of the *Chevron* test we can only say that clear precedent was overruled, and the test structure of that precedent, upon which SAMTA relied, was overruled and declared incapable of serving as a basis for reliance. This is the incongruous situation that makes our applying the *Chevron* test more difficult than in many preceding cases.

We believe, however, that the equitable nature of the *Chevron* test gives it enough flexibility to allow us to reach a conclusion as to whether *SAMTA I* should be applied retroactively. Again, there is no doubt that prior to *SAMTA I*, SAMTA had a persuasive argument that it was exempt from the FLSA. SAMTA was relying on the general framework provided by *National League of Cities*, as it undoubtedly had a right to do. SAMTA also had a right to pursue its claim that it was exempt from the FLSA through the courts, and to the Supreme Court

if necessary, to obtain a final resolution. Once it had obtained a district court decision in its favor, SAMTA definitely had a right to rely on that decision unless it was overturned. To be sure, the district court's decision that SAMTA served a traditional function of government was never overturned. Although SAMTA pursued its right to litigate the question of its status as "traditional" or "nontraditional," it never did obtain a final answer because, before it was able to do so, the Supreme Court swept away the framework upon which the question was to be decided. The special fact that distinguishes our case from other retroactivity cases is that not only did the Supreme Court sweep away the framework, but it also declared that framework illogical and unworkable. Thus, since the framework was illogical and unworkable from the start, we cannot go back and routinely determine under the first prong of *Chevron* whether mass transit would have been exempted from the FLSA under the old doctrine. We believe that this radical elimination of the entire test framework upon which SAMTA's status would have been determined fulfills the first prong of *Chevron*—that the case to be applied nonretroactively "must establish a new principle of law . . . by overruling clear past precedent on which litigants may have relied. . . ." *Chevron*, 404 U.S. 97, 92 S.Ct. 349, 355, 30 L.Ed.2d 296 (1971).

B.

The second prong of the *Chevron* test requires examination of whether retroactivity will " 'further or retard [the] operation' of the holding in question." *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88, 102 S.Ct. 2858, 2880, 73 L.Ed.2d 598 (1982). The district court found that this prong of the test was neutral as far as deciding whether retroactive application should govern. The district court found that backpay awards were unnecessary to compel future FLSA compliance. We agree that since all state and

local governments are now aware that *National League of Cities* has been overruled, and that they must comply with the FLSA in the future, "[t]here is no reason to believe that the threat of a backpay award is needed to cause [state and local governments] to amend their practices to conform to [the Supreme Court's decision]." *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 720-21, 98 S.Ct. 1370, 1381-82, 55 L.Ed.2d 657 (1978). The Third Circuit, which denied retroactivity of *SAMTA I* in a case involving the Port Authority, reached a similar conclusion:

> Now that the Supreme Court has ruled explicitly that no state employees are exempt from FLSA, the Port Authority maintains, there is no reason to believe that state and municipalities will not comply in the future. We agree. The [*SAMTA I*] decision makes the law clear that, in the future, states must comply with FLSA. Regardless of how we decide this case, there is no reason to suspect that states would refuse to be found by FLSA. This situation leaves us free to decide the instant case on its facts and equitable principles without concern for further or retarding the operation of [*SAMTA I*]. The second *Chevron* factor neither favors nor opposes the retroactive application of the [*SAMTA I*] decision.

Mineo v. Port Authority of New York & New Jersey, 779 F.2d 939 (3d Cir. 1985).

Indeed, SAMTA also argues that retroactive FLSA liability might in fact frustrate the *SAMTA I* decision by placing such a burden on municipal and state governments that such governmental functions, and therefore jobs, might have to be eliminated. We think, however, that this argument is best dealt with under the third prong of the *Chevron* test, that is, the equities of retroactivity versus nonretroactivity.

C.

The district court in this case found that the third *Chevron* factor compelled nonretroactivity:

> [T]he third factor which requires consideration of the inequities caused by retroactive application of [*SAMTA I*], compels nonretroactivity of the new rule of law and FLSA coverage. . . . SAMTA structured its conduct based on the reasonable belief that its employees performed a traditional government function. Wage rates and benefit packages were negotiated based on this premise. . . . Having negotiated this package, additional back pay liability would represent a windfall. As the Third Circuit observed in *Mineo v. Port Authority of New York & New Jersey*, 779 F.2d at 946, the courts cannot fairly punish those who are forced to make decisions without immediate guidance from the judiciary and who do so reasonably. This is particularly so where the consistent opinions of this district court found this employment relationship outside FLSA protection. The court need not expressly adopt the cries of "doom and gloom" to taxpayers, riders and recently hired public employees to agree that the third *Chevron* factor mandates nonretroactivity.

While we recognize that SAMTA employees have not been compensated for overtime work in compliance with the FLSA, we find compelling the fact that SAMTA has developed its structure of wages and benefits through meetings with the employees' union representative and that this structure included six types of overtime pay, and took into account the nonapplicability of the FLSA's overtime requirements. The Third Circuit explained in *Mineo* why this background makes retroactive overtime pay inequitable:

> Any public or private organization must manage its revenues to most efficiently provide services at

> the lowest cost. When involved in labor negotiations, the organization poses estimates of how many hours it thinks the employees will work and how much money it has to compensate them. Within those parameters, the organization may opt for various pay structures. For example, some employees may be paid more than others; some compensation may be deferred; or employees may get a higher base pay in return for reduced overtime pay. It appears that the last situation was present in the instant case. Reasonably believing itself to be unshackled from the restrictions of FLSA, the Port Authority offered an attractive base pay that was balanced by lower overtime compensation. The Detectives agreed to this arrangement. The retroactive application of [*SAMTA I*] to this situation would give the Detectives increased overtime pay without any reduction in base pay. To allow the Detectives to get a pay raise premised on retroactive application of an unforeseen decision that was made almost two years after the *end* of the contract period would be inequitable to the Port Authority and would constitute a windfall to the Detectives.

Mineo, 779 F.2d at 946. *See also Morrison, Inc. v. Donovan*, 700 F.2d 1374, 1376 (11th Cir. 1983); *Ramsey v. Harber*, 589 F.2d 753, 760 (4th Cir. 1978), *cert. denied*, 442 U.S. 910, 99 S.Ct. 2823, 61 L.Ed.2d 275 (1979).

Thus, we find that the equities favor nonretroactivity as regards SAMTA for two basic reasons. First, huge back pay awards may very likely cripple the always closely budgeted municipal funds. There is a great difference between, on the one hand, knowing you are subject to a regulation, planning for it and taxing and charging the public for it all along, and, on the other hand, suddenly finding out that, contrary to precedent of the Supreme Court and decisions of the district court, you have been subject to a regulation for several years

and are required to compensate under that regulation for previous years for which tax monies have already been otherwise allocated and spent. Of course, the municipalities and the taxpayers have in some ways benefitted from their exemption from the FLSA. However, the equities do not justify saddling them with huge backpay liabilities when they acted in good faith during all those years, believing for substantial precedential reasons that they were exempt from the FLSA, especially in the light of the next considered equity. The second equity compelling nonretroactivity of the *SAMTA I* decision is that what SAMTA employees have not received in overtime compensation over the past several years, they have received at least partially in other forms. SAMTA must compete for labor in the marketplace against employers who are subject to the FLSA, and so it could not simply subtract the benefits required by the FLSA from its own programs. It would be impossible at this point to calculate how many other benefits SAMTA employees have received instead of these overtime benefits and to subtract the amount from a backpay liability.

V

Thus, after consideration of all three prongs of the *Chevron* test, we find that the retroactive application of *SAMTA I* should be denied. We therefore affirm the judgment of the district court.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-5526

D.C. Docket No. SA-79-CA-458

JOE G. GARCIA, On behalf of himself and others similarly situated,
Plaintiff-Appellant,

versus

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY,
Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas

Before THORNBERRY, POLITZ, and JOLLY, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendant-appellee the costs on appeal, to be taxed by the Clerk of this Court.

March 9, 1988

Issued as Mandate: Mar. 31, 1988

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Civil Action No. SA-79-CA-458

JOE G. GARCIA, *et al.*,
Plaintiffs,

vs.

SAN ANTONIO METRO TRANSIT AUTHORITY,
Defendant.

ORDER

[Filed Feb. 25, 1987]

The matters before the Court are the parties' cross motions for summary judgment. The motions, originally filed in 1985, have been regularly supplemented as both sides have promptly and thoroughly advised the Court of developing case authorities. While the motions concern numerous issues such as liability for liquidated damages and prejudgment interest, this opinion will address only the threshold question of the retroactive application of the Supreme Court's ruling in *Garcia v. San Antonio Metropolitan Transit Authority*, —— U.S. ——, 105 S.Ct. 1005 (1985), to this case.

When the Supreme Court issued its opinion in *Garcia* in February of 1985, it unfortunately gave no guidance to this Court on remand for further proceedings in SA-79-CA-457 or this case. Nor do the Fair Labor Standards Amendments of 1985 assist in the task, expressly reserving for on-going litigation the question of

pre-April 15, 1986 FLSA liability. U.S. Code Cong. & Ad. News 663 (1985).

In grappling with this question the Court now has the benefit of several other state and federal, district and appellate decisions. These authorities make clear that the proper framework for analysis of the retroactivity question is found in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). That case recognized an exception to the general rule that a court apply the law in effect at the time of decision when necessary to avoid otherwise inequitable results. Three factors are identified for consideration when assessing whether the alleged inequity threatened by retroactive application is sufficient to overcome the general rule. "First, the decision to be applied non-retroactively must establish a new principle of law, either by overruling clear precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed." *Id.* at 106. Second, the Court must look at the prior history of the rule in question and decide whether retroactive application will further or retard its operation. *Id.* at 106-107. Finally, the Court must examine the practicalities of retroactive application by determining if "substantial equitable results" or "injustice" or "hardship" would result therefrom. *Id.* at 107. All three considerations need not, and likely will not, dictate a singular result to guide the court in making the retroactivity determination. Application of these factors, particularly the first and the third, to this case requires a conclusion of non-retroactivity.

Addressing the first factor, the court finds that SAMTA's reliance on *National League of Cities v. Usery*, 426 U.S. 833 (1976), are creating an exception from FLSA liability for local bus drivers, was reasonable. The *National League of Cities* standard for determining whether a particular employment relationship was subject to Congressional structuring—i.e., whether the em-

ployees were performing a traditional government function—was *the* test prior to Garcia. Not until three years after *National League of Cities* in late 1979 did the Department of Labor issue an interpretative regulation, 44 Fed. Reg. 75628-75630, declaring its intention to enforce federal wage and hour laws against transit workers, based on the *National League of Cities* analysis. The case that resulted in the *Garcia* decision, SA-79-CA-457, was filed immediately thereafter to challenge the constitutionality of this enforcement policy, relying on *National League of Cities.* In 1981 when first addressing the issue in SA-79-CA-457 the Honorable Fred Shannon ruled that SAMTA employees were performing a traditional government function on the basis of *National League of Cities.* Order, November 17, 1981. After this ruling was vacated by the Supreme Court on appeal subsequent to its ruling in *United Transportation Union v. Long Island Rail Road (LIRR),* 455 U.S. 678 (1978), (holding that a commuter passenger and freight railroad was not exempt from FLSA regulations) Judge Shannon again found the interpretive regulation null and void. Order, February 18, 1983. Notably, Judge Shannon's application of the *National League* analysis and his conclusion that transit employees were traditional government workers were never expressly rejected by the Supreme Court. *National League* was also the focus of the first round of arguments when SA-79-CA-457 went to the Supreme Court for the second time in 1983. Although characterized by some as a logical progression from recent decisions of the Supreme Court, the majority of observers have found the *Garcia* opinion and its wholesale rejection of precedent announced only nine years earlier an unforeseen change in the law. *See e.g., Mineo v. Port Authority of New York & New Jersey,* 779 F.2d 939 (3rd Cir. 1985); *Dove v. Chattanooga Area Regional Transportation Authority,* —— F. Supp. ——, No. Civ. -1-10-249 (S.D. Tenn. 1986); *Kartevold v. Spokane Co. Fire Protection District,* 625 F. Supp. 1553 (E.D. Wash. 1986).

The Court also finds that SAMTA's reliance on *National League of Cities* and prior decisions by Judge Shannon in ordering its conduct was reasonable and pursued in good faith. In this regard the Court notes that SAMTA's conduct was premised on the advice of counsel. *See* Affidavit of Wayne M. Cook, January 17, 1986, in SAMTA's Supplemental Appendix filed January 22, 1986. Following the issuance of the interpretative regulation by the Department of Labor, SAMTA commenced and vigorously litigated its challenge to that regulation through SA-79-CA-457, twice obtaining favorable decisions from the district court. Finally, after the Supreme Court abandoned *National League* and the state employee exception to FLSA coverage, SAMTA quickly adopted overtime payment practices consistent with Garcia. Cook Affidavit. The procedural history of this litigation reflects the reasonableness of SAMTA's reliance and the above described conduct adequately demonstrates good faith.

The second Chevron factor—whether retroactive application of *Garcia* will further or retard operation of the rule announced—neither favors nor disfavors retroactivity. *See e.g., Mineo v. Port Authority of New York & New Jersey*, 779 F.2d at 945. Further adherence to *Garcia* is assured regardless of what this court does with respect to the backpay liability issue.

In contrast, the third factor which requires consideration of the inequities caused by retroactive application of *Garcia*, compels nonretroactivity of the new rule of law and FLSA coverage. As noted above, SAMTA structured its conduct based on the reasonable belief that its employees performed a traditional government function. Wage rates and benefit packages were negotiated based on this premise. *See* Affidavit of Edward F. Carr, January 17, 1986, in SAMTA's Supplemental Appendix filed January 22, 1986. Having negotiated this package, additional backpay liability would represent a windfall.

As the Third Circuit observed in *Mineo v. Port Authority of New York & New Jersey*, 779 F.2d at 946, the courts cannot fairly punish those who are forced to make decisions without immediate guidance from the judiciary and who do so reasonably. This is particularly so where the consistent opinions of the district court found this employment relationship outside FLSA protection. The court need not expressly adopt the cries of "doom and gloom" to taxpayers, riders, and recently hired public employees to agree that the third *Chevron* factor mandates nonretroactivity.

Having determined that the *Garcia* decision should not be applied retroactively, the Court must rely on *National League of Cities* one last time and ask whether the plaintiffs in this suit performed a traditional government function and were therefore exempt from federal overtime requirements before the *Garcia* ruling. Neither party has vigorously urged rejection of Judge Shannon's consistent position on this issue and this Court has found no authority which mandates same. The Court's previous findings and conclusions on this issue, found in its November 17, 1981 and February 18, 1983 Orders in SA-79-CA-457, are hereby ADOPTED. Based on the finding that these employees performed a traditional government function, it is ORDERED that

1) Plaintiffs' motion for summary judgment is DENIED;

2) Defendant's motion for summary judgment is GRANTED; and

3) This matter is DISMISSED with PREJUDICE.

SIGNED and ENTERED this 24th day of February, 1987.

/s/ Edward C. Prado
EDWARD C. PRADO
United States District Judge

APPENDIX C

STATUTES AND REGULATIONS INVOLVED

Fair Labor Standards Act of 1938, 52 Stat. 1060 as amended, 29 U.S.C. §§ 201 et seq.:

MAXIMUM HOURS

SEC. 7. (a) (1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

PENALTIES

SEC. 16. * * * (b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employer or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 17 in which restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 6 or section 7 of this Act by an employer liable therefor under the provision of this subsection.

Portal-to-Portal Pay Act of 1947, 62 Stat. 84, 29 U.S.C. §§ 251, et seq.

SEC. 10. RELIANCE IN FUTURE ON ADMINISTRATIVE RULINGS, ETC.—

(a) In any action or proceeding based on any act or omission on or after the date of the enactment of this Act, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the agency of the United States specified in subsection (b) of this section, or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

(b) The agency referred to in subsection (a) shall be—

(1) in the case of the Fair Labor Standards Act of 1938, as amended—the Administrator of the Wage and Hour Division of the Department of Labor;

(2) in the case of the Walsh-Healey Act—the Secretary of Labor, or any Federal officer utilized by him in the administration of such Act; and

(3) in the case of the Bacon-Davis Act—the Secretary of Labor.

29 C.F.R. Part 775

§ 775.2 SPECIAL ENFORCEMENT POLICY CONCERNING STATES AND POLITICAL SUBDIVISIONS.

(a) On June 24, 1976, the United States Supreme Court ruled in *National League of Cities, et al.* v. *Usery*, 426 U.S. 833, that the minimum wage and overtime compensation provisions of the Fair Labor Standards Act (FLSA) are not constitutionally applicable to the integral operations of the States and their political subdivisions in areas of traditional governmental functions. Such areas include, among others, schools and hospitals, fire prevention, police protection, sanitation, public health, and parks and recreation. They do not include, among others, the operation of a railroad by a State, 426 U.S. at 854, n.18.

(b) In view of the *National League* decision, the Secretary will not file suit to enforce the minimum wage and overtime compensation provisions of the FLSA against a State or its political subdivisions unless at least 30 days notice has first been given that, in the opinion of the Administrator, the activities in question are not integral operations in areas of traditional governmental functions. Such notice will be provided either by specific notification of the employing body in question

or by general notification by publication in the FEDERAL REGISTER in the form of amendments to § 775.3. A reasonable opportunity will be allowed the employing body, after the notice of the administrative determination, to come into compliance voluntarily before suit is brought.

(c) Each such notice will be made available to wage-hour reporting services and to any interested person or association, for information or further publication, except for deletions reasonably necessary to protect the privacy of individual employers and employees.

(d) Because of the complexity of the questions raised by the *National League* decision, it would be inappropriate to seek liquidated damages in addition to back pay in cases to enforce the minimum wage and overtime compensation provisions of the Act against States or their political subdivisions, except as to activities determined by prior controlling judicial decision, or by prior administrative ruling published in the FEDERAL REGISTER, not to be integral operations in areas of traditional governmental functions. The Secretary will therefore not seek liquidated damages as to activities not covered by such decision or ruling, or for periods of employment prior to the publication of such decision or ruling.

(e) As already noted, the *National League* decision applies only to the minimum wage and overtime compensation provisions of the FLSA. This section and § 775.3 accordingly do not apply to claims arising under:

(1) The Equal Pay Act of 1963 (see *Usery* v. *Allegheny County Institution District*, 544 F.2d 148 (C.A. 3, 1976), cert. denied 430 U.S. 946 (1977); *Usery* v. *Charleston County School District*, 588 F.2d 1169 (C.A. 4, 1977); *Pearce* v. *Wichita County*, 590 F.2d 128 (C.A. 5, 1979); *Marshall* v. *Owensboro-Daviess County Hospital*, 581 F.2d 116 (C.A. 6, 1978); and *Marshall* v. *City of Sheboygan*, 577 F.2d 1 (C.A. 7, 1978)).

(2) The Age Discrimination in Employment Act of 1967 (see *Arritt* v. *Grissell*, 567 F.2d 1267 (C.A. 4,

1977)); *Usery* v. *Bd. of Education of Salt Lake City*, 421 F. Supp. 718 (D. Utah 1976); *Aaron* v. *Davis*, 424 F. Supp. 1238 (W.D. Ark. 1976); and *Remmick* v. *Barnes County*, 435 F. Supp. 914 (D. N.D. 1977).

(3) The child labor provisions of the Fair Labor Standards Act.

(4) The protective provisions of section 15(a)(3) of the Act, making it unlawful to discriminate against any employee for participating or assisting in FLSA proceedings.

[44 FR 75629, Dec. 21, 1979]

§ 775.3 NONTRADITIONAL FUNCTIONS OF STATES AND THEIR POLITICAL SUBDIVISIONS.

(a) In the *National League* decision, it was made clear that the operation of a railroad by a State or its political subdivision is not an integral operation in the area of traditional governmental functions. 426 U.S. 833, 854 n.18.

(b) For the purpose of the notice referred to in § 775.2(b), the Administrator has determined that the following functions of a State or its political subdivisions are not traditional. From time to time, this section will be amended to list other such functions determined not to be traditional. The date listed after each function is the date of original publication in the FEDERAL REGISTER. This is the effective date of the general notification described in § 775.2(b). However, where an employing body has actual notice on an earlier date of the position taken by the Administrator, that earlier date is the effective date of the specific notification described in § 775.2(b).

(1) Alcoholic beverage stores December 21, 1979.

(2) Off-track betting corporations December 21, 1979.

(3) Local mass transit systems December 21, 1979.

(4) Generation and distribution of electric power December 21, 1979.

(5) Provision of residential and commercial telephone and telegraphic communication December 21, 1979.

(6) Production and sale of organic fertilizer as a by-product of sewage processing December 21, 1979.

(7) Production, cultivation, growing or harvesting of agricultural commodities for sale to consumers December 21, 1979.

(8) Repair and maintenance of boats and marine engines for the general public December 21, 1979.

[44 FR 75630, Dec. 21, 1979]

§ 775.4 TRADITIONAL FUNCTIONS OF STATES AND THEIR POLITICAL SUBDIVISIONS.

(a) In the *National League* decision, it was made clear that schools and hospitals, fire prevention, police protection, sanitation, public health, and parks and recreation are traditional functions or activities of States and their political subdivisions.

(b) In addition, the Administrator has determined that the following functions of a State or its political subdivisions are traditional (From time to time, this section will be amended to list other such functions determined to be traditional.)

(1) Libraries.

(2) Museums.

[44 FR 75630, Dec. 21, 1979]